IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 1400 OF 2004

Ibrahim A. Gafoor Shaikh & anr. ... Appellants

V/s

Mohammed Yusuf Usman Shaikh & ors. ... Respondents

Mr. S.S. Kanetkar holding for Mr. G.S. Godbole for the appellants.

Mr. Pankaj J. Das for the Respondents.

CORAM: P.V. KAKADE, J.
DATED: 27TH SEPT., 2005

P.C.:

1. The appellant has filed this appeal against the judgment and order passed by the Addl. District Judge, Solapur, dated 19.12.2003 dismissing the appeal and confirming the judgment and order passed by the Joint Civil Judge, Sr.Divn., Solapur, dated 9.7.1997 decreeing the suit for partition and separate possession and other consequential reliefs.

2. I have heard the learned counsel for both sides. Perused the record.

3. The plaintiff filed the suit for partition and

separate possession claiming 80/210th share in Municipal House No.163, situated at Sadar Bazar, Solapur. Parties to the suit are related to each other and house was originally owned by Jaitunbe who was mother of plaintiff and defendant No.5. She died on 1.4.1961. The suit house consists of 5 rooms, out of which one room is in possession of plaintiff and 3 rooms are in possession of defendant No.1. According to the plaintiff, the defendant forcibly dismantled one room and dispossessed defendant Nos. 3 and 4. It is further alleged that since death of his father defendant No.1 let out two rooms to tenants and recovering rent. Defendant No.1 did not give account of rent and, therefore, prayer includes rendition of account. Defendant was issued with notice by the plaintiff when he was out of share in the suit property on 9.7.1986 for partition of the said house. Reply was received from the defendant No.1 refusing the claim of the plaintiff and hence the suit is filed.

4. The defendant No.1 contested the suit inter-alia submitting that the plaintiff had no right, title and interest to the suit property. According to the defendants, in view of the agreement dated 21.9.1957 they had become owner of suit house and demanded amount

and in the alternative it was submitted that they have become owner by adverse possession and sought dismissal of the suit.

5. The learned Trial Judge adjudicated the dispute on merits and came to the conclusion that the plaintiff had proved his share to the extent of 2/7 share and was also held entitled for separate possession of the property of his share. Plaintiff's plea for accounts, however, was rejected. Defendants' plea that the suit was barred by law of limitation as well as obtaining title of possession was rejected and suit came to be decreed.

The appeal was carried to the District Court at Solapur. The learned Addl. District Judge, after hearing both sides on available evidence came to the conclusion that the findings recorded by the learned lower Court Judge were legal and proper and hence dismissed the appeal. Hence the present appeal.

6. At the outset, it may be noted that there is no substantial question of law involved in this case. The learned counsel for the appellant vehemently urged that the suit was clearly barred by law of limitation in view of the fact that there was possession of suit property

of the defendants since the execution of the agreement dated 21.9.1959, whereas the cause of action to file the present suit arises from the year 1967 when defendant No.1 was shown to be the owner of described suit house after his name was inserted in city survey record and, therefore, the suit which was filed in the year 1991 was barred by law of limitation. However, in this regard, it must be noted that by virtue of Art.65 of the Limitation Act, the suit would be within the limitation because the first refusal came from the defendants in the manner of reply to the suit Exh.70 on 12.8.1986 and, therefore, the suit was within 12 years from such refusal. The learned counsel for the appellants sought to submit that the plaintiffs had executed an agreement dated 21.9.1959 by which virtue they had extinguished their right to the suit property. However, the said so-called document of agreement has not come-forth on record at all. It was not produced in the Trial Court nor in the lower appellate Court. However, it was sought to be relied upon at the time of admission of this appeal which cannot be allowed. Once it is clear that the document which is relied upon by the defendants 1 and 2 to establish their claim to show that the plaintiff’s right was extinguished by agreement of sale, has not been provided on record and no explanation

comeforth for such omission. If that is the position, then it cannot be said that the suit is barred by law of limitation. It was further submitted that the plaintiff had knowledge that the defendants were in possession of the suit property. However, it must be noted that they are co-sharer and mere knowledge of the fact that defendants are in possession of the suit property and their names were recorded in the record of right, would not be sufficient to disentitle the plaintiff from seeking partition of the property in which evidently they had share.

The learned counsel for the appellant also sought to raise the question of adverse possession at this stage. However, concurrent findings recorded by both the Courts below are clear enough to show that the plaintiff's evidence is seen to be not satisfactory to hold that the defendants have perfected adverse title to the suit property.

7. Under the circumstances, I hold that there is no merits in the appeal. The concurrent findings recorded by both the Courts below are seen to be recorded after proper appreciation of the entire evidence on record and, therefore, it would brook no interference.

In the result, the appeal stands dismissed with no order as to costs. Consequently, Civil Application No. 1917 of 2004 also stands dismissed with no order as to costs.

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